NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL ANTHONY RUIZ, Appellant.	2 CA-CR 2008-0327 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20080026

Honorable Gus Aragón, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Kristine Maish
Tucson
Attorneys for Appellant

B R A M M E R, Judge.

¶1 In August 2008, a jury found appellant Michael Ruiz guilty of two counts of aggravated driving under the influence of intoxicating liquor (DUI), finding his driver's license already had been suspended or revoked and he had been convicted of two or more DUI offenses during the eighty-four months preceding his current charges. The trial court suspended imposition of sentence and placed Ruiz on three years' probation to begin after he completed a four-month term of imprisonment, as required by A.R.S. § 28-1383(D).

¶2 On appeal, Ruiz argues the trial court abused its discretion in permitting the prosecutor to ask prospective jurors whether they would be able to render a verdict that Ruiz was driving while impaired to the slightest degree if no evidence of breath or blood test results were introduced to establish his alcohol concentration at the time of his arrest. He also argues the court abused its discretion in excusing seven members of the jury panel based on their responses to this and related follow-up questions. He maintains this abuse of discretion resulted in reversible error. For the following reasons, we affirm.

¶3 The facts of this case, viewed in the light most favorable to upholding the jury's verdict, *State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003), are as follows. Tucson police officer Jeff Hawkins was monitoring traffic around midnight when he saw Ruiz fail to stop at a stop sign while driving a truck with one working headlight. As Hawkins followed Ruiz, he further observed him brake the vehicle erratically and weave into the lane to his left before pulling into an apartment complex and parking the truck at an angle across two parking spaces. Hawkins approached the vehicle and made contact with Ruiz,

observing his bloodshot and watery eyes, slurred and incoherent speech, flushed face, and strong odor of alcohol. Ruiz told Hawkins he lived at the apartment complex and initially denied he had been drinking, but later admitted to having had three beers, although he denied he was intoxicated. Hawkins conducted a horizontal gaze nystagmus test and noted six out of six possible cues for intoxication. After he observed additional significant cues of intoxication when Ruiz performed other field sobriety tests, Hawkins took him into custody and attempted to administer breath alcohol tests. The first test failed due to radio frequency interference; the second and third failed because of insufficient breath samples.[1]

¶4 During jury selection, the state approached the bench and proposed asking prospective jurors, "If there is no breath or blood test involved in this case, is there anyone on the panel who would be unable to reach a verdict because of the absence of such scientific evidence?" Ruiz's attorney responded, "I guess I object, Judge, that [driving with a specific alcohol concentration is] not an element of any charge." The court allowed the inquiry, reasoning it was "an abstract question" about whether prospective jurors would insist on evidence of Ruiz's blood alcohol concentration (BAC) to prove he was driving under the influence of an intoxicating liquor and impaired to the slightest degree, the only two elements required to convict Ruiz under A.R.S. § 28-1381(A)(1). *See Montano v. Superior Court*, 149 Ariz. 385, 388, 719 P.2d 271, 274 (1986) (chemical test not required to prove charge of

[1]The trial court had granted Ruiz's motion to suppress evidence of blood tests subsequently performed on Ruiz, and the state had dismissed two counts of the indictment that had alleged aggravated driving with an alcohol concentration of .08 or more.

driving under the influence of intoxicating liquor under former A.R.S. § 28-692(A)); *Guthrie v. Jones*, 202 Ariz. 273, ¶ 13, 43 P.3d 601, 604 (App. 2002) (to establish violation of § 28-1381(A)(1), state need not prove "defendant's alcohol concentration was at or above any particular level; it need prove only that the defendant was 'impaired to the slightest degree' as a result of being 'under the influence of intoxicating liquor'").

¶5 As the result of this and related follow up questions, seven members of the jury panel were excused for cause.[2] On appeal, Ruiz maintains the state's questioning was improper because it was "designed to condition the jurors" to expect that the state would not be presenting BAC evidence "and to commit them to certain positions prior to receiving the evidence." *State v. Melendez*, 121 Ariz. 1, 3, 588 P.2d 294, 296 (1978). He contends counsel's objection to the questioning was sufficient to preserve his claims of error on appeal and that the errors were not harmless. Alternatively, he argues the errors in allowing the questioning and in excusing the jurors "so undermined the integrity of the trial process" that they must be considered not only fundamental error, but structural error, requiring reversal even in the absence of demonstrated prejudice. *See State v. Valverde*, 220 Ariz. 582, ¶¶ 10, 12, 208 P.3d 233, 235-36 (2009).

¶6 We agree with the state that Ruiz's objection to the state's question about the absence of BAC evidence did not apprise the trial court sufficiently of the constitutional

[2]Ruiz's counsel objected to the dismissal of these potential jurors based on his prior objection to the state's question. He raised no other objection.

arguments he now raises on appeal. *See State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground."). Accordingly, he has forfeited review of his claims absent fundamental or structural error. *See id.* (fundamental error); *see also State v. Fimbres*, 222 Ariz. 293, n.6, 213 P.3d 1020, 1030 n.6 (App. 2009) (fundamental or structural error).

¶7 Rule 18.5, Ariz. R. Crim. P., requires a trial court to conduct "a thorough oral examination of prospective jurors," but one that is also "limited to inquiries directed to bases for challenge for cause or to information to enable the parties to exercise intelligently their peremptory challenges." Ariz. R. Crim. P. 18.5(d), (e). Accordingly, the court must "ask prospective jurors any question it deems necessary to determine their qualifications and to enable the parties to intelligently exercise their peremptory challenges and challenges for cause," *State v. McMurtrey*, 136 Ariz. 93, 99, 664 P.2d 637, 643 (1983), and "simply asking potential jurors whether they can follow the law and be fair and impartial is insufficient." *State v. Smith*, 215 Ariz. 221, ¶ 39, 159 P.3d 531, 540 (2007).

¶8 On the other hand, a trial court must guard against questions not "reasonably designed to expose possible prejudices on the part of the jurors," but that instead serve "to condition the jurors to damaging evidence expected to be presented at trial and to commit them to certain positions prior to receiving the evidence." *Melendez*, 121 Ariz. at 3, 588 P.2d at 296 (requiring jurors to commit to resolution of case "not a legitimate function of voir dire questions"); *see also McMurtrey*, 136 Ariz. at 99, 664 P.2d at 643 ("not a legitimate function

of voir dire to condition the jury to the receipt of certain evidence or to a particular view of the evidence"). In short, there is no "'catechism for voir dire.'" *Smith*, 215 Ariz. at 230, ¶ 39, 159 P.3d at 540, *quoting Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

¶9 Voir dire about a juror's opinions is generally appropriate when there is "a nexus shown between the prejudice feared and the issues of the case," *State v. Skaggs*, 120 Ariz. 467, 470, 586 P.2d 1279, 1282 (1978), because a court must excuse a prospective juror for cause "when there is reasonable ground to believe that a juror cannot render a fair and impartial verdict." Ariz. R. Crim. P. 18.4(b). But having opinions or preconceived ideas does not necessarily render someone unable to be a fair and impartial juror. *State v. Clabourne*, 142 Ariz. 335, 344, 690 P.2d 54, 63 (1984). A panel member need not be excused for cause if he or she is willing to put aside prejudicial opinions and weigh the evidence as the law requires. *Id.*

¶10 In this case, the trial court eventually instructed the empaneled jury that "[a] fact may be proven by either direct or circumstantial evidence." The court instructed the jury further as follows:

> The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that after weighing all of the evidence you be convinced of the guilt of the defendant beyond a reasonable doubt before the defendant can be convicted.

The state argues members of the public have come to expect scientific evidence at trials, particularly in DUI cases, and mistakenly may believe BAC evidence is required to convict

a defendant of driving under the influence of an intoxicant while impaired to the slightest degree. According to the state, it therefore was reasonable to question the jurors about their ability to render a verdict on circumstantial evidence alone. After extensive questioning, seven prospective jurors responded they could never convict Ruiz of driving under the influence while impaired without evidence of his BAC, regardless of any circumstantial evidence that might be presented, and regardless of the court's instructions on the law. We cannot agree with Ruiz that the questioning was designed to require jurors to commit to convicting Ruiz based on the evidence that would be presented; it appeared instead to have been designed to determine whether jurors could consider that evidence fairly in light of the court's instructions. The court explained the following to one member of the panel:

> The question is[,] can you listen to the evidence and decide whether there might be some other circumstance or whether there's an explanation that you find valid, whether it supports a finding of guilty or not guilty based upon the circumstances and the evidence that you are presented with?

The panel member responded, "Not without a [BAC] number, no."

¶11 It arguably would have been preferable to ferret out the prejudices of panel members in another manner. We also acknowledge that the confusing phrasing of some of the voir dire may have placed undue emphasis on the topic. But, other questions asked by the court, as well as defense counsel, conveyed to the jurors that they were not being asked to commit to a verdict before hearing the evidence. We find no abuse of discretion in the voir dire conducted or the court's dismissal of jurors who indicated they could not comply with

the court's instructions on the law. *See State v. Via*, 146 Ariz. 108, 117, 704 P.2d 238, 247 (1985) (reviewing court "look[s] to the entire voir dire examination" to determine if trial court abused discretion).

¶12 Moreover, as a general matter, "'[w]e will not disturb the trial court's selection of the jury in the absence of a showing that a jury of fair and impartial jurors was not chosen.'" *State v. Walden*, 183 Ariz. 595, 607, 905 P.2d 974, 986 (1995), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 108, 927 P.2d 762, 768 (1996), *quoting State v. Tison*, 129 Ariz. 546, 551, 633 P.2d 355, 360 (1981). And, even if the questioning and dismissal of the seven jurors was improper, Ruiz acknowledges he is unable to establish any basis for us to conclude the jury did not fairly try and convict him.[3] Thus, he has failed to show the prejudice required to establish fundamental error. *Cf. State v. Hickman*, 205 Ariz. 192, ¶¶ 28, 41, 68 P.3d 418, 424, 427 (2003) (defendant tried by fair and impartial jury not prejudiced by error in voir dire; error harmless).

¶13 Notwithstanding the rule announced in *Walden*, Ruiz contends any error the trial court committed during voir dire should be regarded as structural. Although Ruiz argues by analogy to other circumstances found to constitute structural error, he cites no Arizona authority for the proposition that errors in voir dire examination require automatic reversal.

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[3]We are unpersuaded by Ruiz's suggestion that remaining members of the panel were tainted by the questioning and had been "conditioned" to convict Ruiz based on whatever circumstantial evidence was presented. At least equally likely is that the opinions of the seven panel members who had been dismissed may have made the impaneled jury more critical of the state's evidence.

And, apart from the specific context of qualifying jurors in capital cases, we are aware of no such authority. *But cf. State v. Anderson*, 197 Ariz. 314, ¶ 23 & n.5, 4 P.3d 369, 379 & n.5 (2000) (finding structural error when potential jurors dismissed for general objections to death penalty without opportunity for rehabilitation on voir dire).

¶14 We decline to find the trial court abused its discretion during the jury selection process. Ruiz has failed to establish the prejudice required to reverse his convictions. For the foregoing reasons, we affirm Ruiz's convictions and dispositions.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge